

Raj Kumar (Migration) [2023] AATA 4443 (20 November 2023)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Raj Kumar Raj Kumar

REPRESENTATIVE: Mr Harpal Bajwa (MARN: 0955800)

CASE NUMBER: 2113228

HOME AFFAIRS REFERENCE(S): BCC2020/1173969

MEMBER: Warren Stooke AM

DATE: 20 November 2023

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Skilled Work Regional (Provisional) (Class PS) visa.

Statement made on 20 November 2023 at 1:55pm

CATCHWORDS

MIGRATION – Skilled Work Regional (Provisional) (Class PS) visa – Subclass 491 (Skilled Work Regional (Provisional)) – false or misleading information – claimed employment – bogus document – employer reference – payslips – bank statements – purposeful falsity – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 491.211; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 14 September 2021 to refuse to grant the applicant a Skilled Work Regional (Provisional) (Class PS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 15 March 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 491.211 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the department reasonably suspected that the applicant may have given to the Minister and the skill assessing body in relation to your claim employment as a Chef with Benalla Curry House in Australia, information that is false and misleading. It is alleged that the applicant has given employment documentation in the form of a work reference issued by Benalla Curry House Indian Tandoori Restaurant dated 07 January 2020, payment summary 2018 to 2019, Notice of assessment FY 2018 to 2019, payslips 2018 to 2019, bank statement 2018 to 2019 and some evidence of superannuation statement 2016 to 2021, information that is false and misleading in terms of the claimed duration of employment, hours worked, duties undertaken and remuneration received.
6. The applicant appeared before the Tribunal on 25 October 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
8. The applicant stated that he had received the decision of the delegate relating to his visa and had read the decision.
9. The applicant stated that he understood his visa application had been refused on the basis that he understood his bank statement and pay slips were not genuine.
10. The applicant confirmed to the Tribunal that a copy of the delegate's decision had been provided to the Tribunal with the applicant's application for review.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 491.211 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years

before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
14. The applicant provided evidence that he arrived in Australia on 28 June 2014 and was granted a Bridging Visa C on 15 March 2020 with no conditions.
15. The applicant provided the Tribunal with evidence of a successful assessment from TRA for the nominated occupation of Chef for work performed in Benalla between 24 August 2018 and 1 September 2019, which was dated 3 October 2019.
16. The applicant provided evidence of a taxation assessment from 9 July 2018 to 30 June 2019, which had a Wangaratta address.
17. The applicant provided a reference that he worked with Benalla Curry House Indian Tandoori Restaurant [Neelanfoods Pty Ltd] with an ABN: 85 613 585 747 from 4 September 2017 to 1 October 2019 in the occupation of Chef.
18. The applicant provided evidence of an ATO assessment dated 11 August 2018 for the period ending 30 June 2018 with an address of Werribee.
19. The applicant provided evidence of a Certificate III in Commercial Cookery undertaken at the Front Cooking School and awarded on 29 May 2017.
20. The applicant provided evidence of a Certificate IV in Commercial Cookery undertaken at the Front Cooking School and awarded on 7 December 2017 and a Diploma of Hospitality Management awarded on 7 December 2017.
21. The applicant provided evidence of undertaking a PTE English Language test on 4 November 2019 with an overall score of 55.
22. The applicant provided evidence of a National Police name check dated 18 April 2020 with 'no disclosable court outcomes'.
23. The Tribunal referred to the applicant's ATO Tax assessment for the period ending 30 June 2018 that was sent to a Werribee address and the CBA Bank account for the period 1 July 2018 to 31 December 2018 with a Werribee address and asked why was regular expenditure incurred in the Western suburbs of Melbourne, that suggested he was residing in Western Melbourne. The applicant responded that his cousin/brother was using this account.

24. The Tribunal asked the applicant what account were his wages paid into and he stated an ANZ account, which he used for personal expenditure.
25. At the request of the Tribunal the applicant was asked to provide evidence of an ANZ account, post hearing.
26. On 8 November 2023, the applicant provided an ANZ Bank statement for the period from 5 February 2019 to 6 April 2019, which had one deposit of \$800 on 11 February 2019; together with a statement from 4 June 2019 to 6 April 2019, with one deposit of \$200.
27. The Tribunal asked the applicant that the reference from Benalla Curry House Indian Tandoori Restaurant stated he worked at the restaurant, as a Chef, from 4 September 2017 until 01 October 2019 and was that correct? The applicant responded that he worked part-time from 2 September 2017 and full-time from 24 August 2018 until 1 September 2019. It was also stated that he worked from 11.00am to 1.00pm and then from 4.30 to 10.30pm, which did not include preparation time.
28. The applicant stated that he had an earnings package of \$40,000 and that he was paid \$21.90 per hour. The Tribunal noted that \$40,000 at \$21.90 per hour, represents 35.12 hours per week for 48 weeks excluding annual leave and how did he explain that? The applicant responded that he initially worked part-time.
29. The Tribunal asked the applicant: how does he explain the difference in dates from 1 September 2019 and 1 October 2019 and the applicant responded: *"not in my head"* and that inconsistencies were *"personal issues of the employer"*.
30. The Tribunal put to the applicant that his CBA bank statement reflects credit entries with dates 13 July 2018 with Ref Direct credit Mr Kulveer Singh salary amounting to \$ 734 and 26 August 2018 with Ref Transfer from Neelonfoods salary amounting to \$1,332. This would indicate you commenced employment earlier than 24 August 2018 and were you paid in cash and was it taxable? The applicant responded: *"Yes"*.
31. The Tribunal asked the applicant why he was paid in cash and direct credit? The applicant responded he was paid cash very rarely and that *"sometimes the accountant paid not into account. Cash on rare occasions and paid tax"*
32. The Tribunal put to the applicant information contained in the delegate's decision that his superannuation statement provided in support of his PS 491 visa application showed there were 2016 contributions made by Lionheart Security, a company not declared by you in any of the current and previous visa applications. There was no record of Benalla Curry's superannuation contribution in relation to your employment in September 2017. Instead, the super transaction history dated 12 May 2021 showed Benalla Curry's contribution from August to 2018 to September 2019. This is a once off superannuation contribution transaction recorded. The Tribunal asked if this was correct and the applicant responded: *"Yes"*. The Tribunal then asked, why was that and the applicant responded: *"Initially they did not pay"*. He then stated that after a complaint about the employer not paying superannuation a contribution payment was made in 2021.
33. The Tribunal put to the applicant that a payslip of 17 October 2018 of \$1,416 had no corresponding credit identified in the CBA bank account and the applicant responded that he was paid in *"cash"*.
34. The Tribunal put to the applicant that a payslip of 31 August 2018 of \$708, had no corresponding credit identified in the CBA bank account and the applicant responded that he was paid in *"cash"*.

35. The Tribunal put to the applicant that a payslip of 19 September 2019 of \$1,416, had no corresponding credit identified in the CBA bank account and the applicant responded that this was the result of “*accounting issues*”.
36. The Tribunal asked the applicant if he was currently working full-time or part-time and he responded that he was living in India and had left Australia one and a half years ago.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

37. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
38. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
39. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
40. The Tribunal is satisfied that the applicant was not working full-time at the Benalla Curry House Indian Tandoori Restaurant [Neelanfoods Pty Ltd] with an ABN: 85 613 585 747 from 4 September 2017 to 1 October 2019 in the occupation of Chef, as stated in the reference provided by the employer.
41. Further, the Tribunal was provided with evidence that the applicant held a postal address in the Wangaratta area during the period of assessment, however, expenditure from his CBA bank statement for the period 1 July 2018 to 31 December 2018, with a Werribee address, incurred regular expenditure in the Western suburbs of Melbourne, that suggested he was residing in Western Melbourne. The applicant responded that his cousin/brother was using this account and that his money was in an ANZ count in Wangaratta. A review of the ANZ bank statements, submitted after hearing, for the period from 5 February 2019 to 6 April 2019, had one deposit of \$800 on 11 February 2019; together with a statement from 4 June 2019 to 6 April 2019, had one deposit of \$200. This new evidence did not corroborate that he was paid by his employer into a bank account and also conflicts with the statement that he was “rarely” paid in cash. As such, the Tribunal is satisfied that there is significant conjecture in relation to the applicant’s claims that he worked full-time as a Chef for Benalla Curry House Indian Tandoori Restaurant [Neelanfoods Pty Ltd] with an ABN: 85 613 585 747 from 4 September 2017 to 1 October 2019, as stated in the employer reference.
42. On the basis of the above evidence, the Tribunal is satisfied that there is sufficient conflicting evidence before the Minister that the applicant has given, or caused to be given, to the Minister, a bogus document in relation to a visa application.

43. In relation to purposeful falsity, for the requirements in PIC 4020(1) and (2) to be engaged, it is not necessary to show knowing complicity by the visa applicant.^[1] The words 'given or caused to be given' do not import a mental element such that an applicant needs to know that the documents or information they are providing are defective in the relevant sense.^[2] All that is necessary is that the information provided was purposefully false.^[3] In the circumstances of this review, the Tribunal is satisfied that there was purposeful falsity on the part of the applicant in his claims to have worked full-time with Benalla Curry House Indian Tandoori Restaurant [Neelanfoods Pty Ltd] with an ABN: 85 613 585 747 from 24 August 2018 to 1 September 2019.
44. The Tribunal notes that it was not conceded at hearing that purposeful falsity existed in relation to work related documentation, despite significant discrepancies with the living address during a period of supposed residency and employment in Benalla; the absence of bank account credits that substantiated the applicant's employment and claims that he was 'rarely' paid in cash, when insufficient bank statement evidence corroborated this claim.
45. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

46. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
47. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
48. The Tribunal explained to the applicant the discretion of the Tribunal to exercise a 'waiver' in circumstance where the Tribunal was satisfied that PIC4020(1) had not been met.
49. The applicant responded to the Tribunal that: "*there are no compelling or compassionate reasons*".
50. The Tribunal asked the applicant if he was making application for the Tribunal to exercise a waiver and on what basis. The applicant responded that he worked there (Benalla) for two years and this was due to the employer's mistakes that were not under his control. He also stated that he had spent a long time in Australia.
51. The Tribunal invited the applicant to comment and he stated: "*I first arrived in 2014, studied and worked in my own field.*"
52. The applicant stated that he did not get any justice and left Australia after the decision; engaged with the AAT and always complied with the laws.
53. Further, the applicant stated that he was not living in Australia.
54. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

55. The applicant has not provided evidence of compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.
56. Therefore the requirements of PIC 4020(1) and (2) should not be waived.
57. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 491.211.

DECISION

58. The Tribunal affirms the decision not to grant the applicant a Skilled Work Regional (Provisional) (Class PS) visa.

Warren Stooke AM
Member

^[1] *Trivedi v MIBP* [2014] fcafc 42; (2014) 220 fcr 169 at [43]–[44]. Cited with approval in *Singh v MIBP* [2018] fcafc 52 at [144].

^[2] *Vyas v MIAC* [2012] fmca 92 at [68]. This view was endorsed in *Sran v MIBP* [2013] fcca 37.

^[3] *Trivedi v MIBP* [2014] fcafc 42; (2014) 220 fcr 169. See also *Chung v MIBP* [2015] fca 163 at [25]. In that case the court found that the inclusion of a skills assessment reference of which the assessing authority had no record, and evidence that the assessing authority had no skills assessment reference referable to the appellants was sufficient for the tribunal to find there was information associated with the visa application which had the necessary quality of purposeful falsity. It was not necessary for the tribunal to go further and determine whether the visa applicants had knowingly been involved in the provision of that false information or document before finding that there has been a failure to comply with pic 4020.

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...